STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2003
v	No. 241285 Oakland Circuit Court
VONLEE NICOLE TITLOW, Defendant-Appellant.	LC No. 2001-177745-FC

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316, but was convicted of the lesser offense of second-degree murder, MCL 750.317, following a jury trial. He appeals as of right.[1] We affirm.

I. Facts

Defendant's conviction arises from his involvement in the killing of his elderly, wealthy uncle, Donald Rogers. According to the prosecution's theory of the case, defendant agreed to help his aunt, Billie Rogers, kill Donald so that Billie could quickly inherit Donald's large estate. Defendant allegedly planned to pay for a sex change operation with his share of the proceeds.

Danny Chahine befriended defendant in June 2000, after meeting him in a casino. Defendant was then living with Donald and Billie Rogers. On August 12, 2000, defendant called Chahine on the telephone and tearfully told him that Donald had been found dead on the kitchen floor. Chahine was suspicious because defendant had previously talked about Billie's willingness to pay $25,000 to have her husband killed because he objected to Billie incurring credit card debt in order to gamble at casinos. When Chahine asked defendant if he or his aunt

[1] Defendant took on the appearance of a woman, and preferred to be called "Nicole." Nonetheless, he denied that he wanted a sex change operation. At trial, witnesses used a combination of male and female pronouns when referring to defendant. Accordingly, some quotations from the trial record refer to defendant as a female. This opinion will generally refer to defendant using male pronouns.

had done something to Donald, defendant did not reveal anything incriminating, but said he would explain everything later.

Chahine testified that defendant later confided that he had helped kill Donald Rogers. According to Chahine, he had two inculpatory conversations with defendant: (1) a dinner meeting on August 14 or 15 in which defendant first disclosed the killing; and (2) a second meeting that was secretly recorded. The recording and a transcript of the second meeting were introduced into evidence.

Several of defendant's issues involve allegations against his attorneys. Defendant was represented by a succession of three attorneys. The first attorney negotiated and recommended a plea agreement in which defendant pleaded guilty to manslaughter with a seven to fifteen year sentence. Under the agreement, defendant was required to testify against Billie Rogers and successfully pass a polygraph test denying his involvement in the offense. According to the opinion of the polygraph examiner, defendant was being truthful when he denied being involved in the killing.

Although the record is not fully developed on this point, defendant told a sheriff 's deputy at the jail that he planned to plead guilty despite his protestations of innocence. The deputy suggested that it would not be proper to plead guilty to an offense that defendant did not commit, and perhaps defendant should talk with another attorney. The deputy put defendant in touch with an attorney, who in turn recommended that defendant speak with another attorney. That attorney appeared in this matter and, according to defendant, recommended that he withdraw his guilty plea. Defendant moved to withdraw his plea because the agreed upon sentence exceeded the sentencing guidelines range.

The second attorney later moved to withdraw because defendant did not have sufficient resources to pay for a transcript of Billie Rogers' trial.[2] In questioning defendant and counsel, the court learned that counsel's firm had agreed to represent defendant for some jewelry and assignment of a "book deal." The court granted counsel's motion to withdraw from representation, and appointed a third attorney to represent defendant at trial.

II. Effective Assistance of Interim Counsel

In his first issue, defendant argues that he was denied the effective assistance of counsel when his second attorney recommended that he withdraw his guilty plea to manslaughter, which resulted in a trial verdict on the higher offense of second-degree murder. Defendant also argues that the attorney had a conflict of interest when rendering this advice because his law firm had obtained the media rights to defendant's story.

The right to the effective assistance of counsel is not offended unless counsel's performance fell below an objective standard of reasonableness and defendant was so prejudiced that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Prejudice exists

[2] Billie Rogers was acquitted and eventually died.

when there is a reasonable probability that the result of the proceeding would have been different absent counsel's error. *Pickens*, *supra* at 312; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A. Withdrawal of Guilty Plea

When a defendant pleads guilty, he must be prepared to admit the elements of the offense. MCR 6.302(D)(1). The record discloses that the second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense.[3] Defendant offers the affidavit of his first attorney, who negotiated a plea agreement that he thought was in defendant's best interests. When a defendant proclaims his innocence, however, it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty – no matter how "good" the deal may appear. We therefore reject defendant's argument that his second attorney gave him "grossly erroneous advice."[4] On the proofs and arguments offered by defendant, defendant has failed to demonstrate that his second attorney's advice to withdraw his plea fell below an objective standard of reasonableness.[5]

B. Conflict of Interest

We now turn to defendant's allegation that his second attorney acquired an improper interest under MRPC 1.8.[6] Although the type of memorable or "juicy" story that sells books or movies may conflict with a defendant's best interests at trial, in this case defendant's second attorney withdrew before any harm could potentially be done. Defendant has not demonstrated that any impropriety by counsel deprived him of the effective assistance of counsel. See *Cuyler*

---

[3] Defendant did not move in the trial court for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Although defendant filed a motion to remand for a *Ginther* hearing in this Court, the motion was denied. Therefore, our review of this issue is limited to mistakes apparent from the record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). On appeal, defendant has submitted additional materials that are not part of the lower court record. We will consider these materials for the limited purpose of determining whether they disclose factual support for defendant's ineffective assistance of counsel claim, such that remand for a *Ginther* hearing would be appropriate.

[4] This is not to suggest that defendant's first attorney who negotiated the plea agreement performed deficiently. The record does not disclose what assurances or admissions defendant may have made to his first attorney to cause him to believe that it was in defendant's best interests to tender a plea.

[5] We find without merit defendant's assertion that the actions of the second attorney constituted "state action" for constitutional purposes because attorneys are "officers of the court." Additionally, although the sheriff's deputy is a governmental employee, defendant has not shown any prejudice or violation of his rights based on the deputy's involvement, which was limited to providing generic advice that a person who is innocent should not plead guilty.

[6] MRCP 1.8(d) specifically addresses a lawyer's interest in the client's literary or media rights.

v Sullivan, 446 US 335, 349; 100 S Ct 1708; 64 L Ed 2d 333 (1980) (a defendant must show prejudice unless he can demonstrate that "a conflict of interest *actually affected* the adequacy of his representation") (emphasis added). See, also, *Dukes v Warden*, 406 US 250, 256-257; 92 S Ct 1551; 32 L Ed 2d 45 (1972) (where the defendant could not show that his attorney's conflict of interest affected his decision to plead guilty, the plea was not rendered involuntary and unintelligent by ineffective assistance of counsel).[7]

III. Effective Assistance of Trial Counsel

Next, defendant argues that he was denied the effective assistance of counsel by the manner in which his third attorney conducted the trial.

As noted earlier, because defendant did not make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to details of the alleged deficiencies apparent on the existing record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

A. Eliciting Damaging Testimony/Failure to Impeach

Defendant argues that trial counsel was ineffective when he elicited damaging information from the prosecution's main witness, Danny Chahine, and then failed to impeach Chahine with prior statements contradicting the damaging version. The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Id*.

During cross-examination of Chahine, counsel asked about defendant's statements describing how Donald was killed. Chahine had earlier testified that defendant put his hand over Donald's mouth, but kept a passage open so Donald could breathe. Meanwhile, Billie Rogers was offering increasing sums of money for defendant's cooperation, from $25,000 to $50,000. Counsel asked Chahine about defendant's actions as Billie went for a pillow to suffocate her husband:

> *Q*. But after you indicate that Billie is becoming frustrated and she makes the statement from 25 to $50,000, you never hear Nicole make another statement that she put his – her hand back over Don Rogers' mouth?
>
> *A*. No.

[7] An attorney who attended an arbitration hearing into the sheriff's deputy's involvement in rendering advice to defendant submitted an affidavit indicating that proofs at the arbitration hearing disclosed that the second attorney's fee agreement included an assignment of book/movie/television rights. At the time the attorney withdrew from representation, he informed the court that a proposed book deal "fell through."

Q. You didn't hear a statement that [defendant] held him down so that the pillow could be placed over his head?

A. I did hear a statement like that.

Q. You did hear that statement?

A. Yes.

Q. What statement did you hear?

A. Billie asked her to help pin him down, so that she could put the pillow on his head.

As a result of this damaging testimony, defendant argues, counsel abandoned a "mere presence" defense, which had earlier been argued in opening statements. Defendant argues that counsel should have impeached Chahine with three prior statements denying that defendant was involved in the smothering of Donald. Those prior statements consisted of the following:

(1) A videotaped interview of Chahine by a police detective, in which Chahine stated that defendant did not say what he was doing at the time Donald was smothered;

(2) Chahine's testimony at Billie Rogers' trial, in which he testified that defendant "did not tell me . . . if she did help her with the pillow or not;" and

(3) Chahine's testimony at the preliminary examination in this matter, in which he testified that defendant told him that he stood back and did not help smother the victim.

Defendant's argument is based on several assumptions. First, he assumes that there was a discrepancy between the trial testimony and the prior versions of the events. At trial, defense counsel finished his cross-examination of Chahine with a clarification that changed the character of the allegation:

Q. And at no time during the conversation [with police] did you tell Detective Tullock that while the pillow [w]as over, Nicole also indicated to you she was holding him down?

A. No. She was holding her [sic] down during some period of time. I don't remember if while the pillow was in his face. All I remember is that Billie asked Nicole to help her pin him down.

Q. So it could have been during the time that they were pouring alcohol down his throat?

A. It could have been.

Because counsel succeeded in getting Chahine to concede that his impression may have been inaccurate, we cannot say that defendant was prejudiced by counsel's failure to impeach him further.

Second, defendant assumes that defense counsel was aware of the materials containing the witness' prior statements. Defendant asserts that certain statements are contained in a transcript of Chahine's videotaped interview with the police, yet he concedes that trial counsel did not have the transcript. Instead, counsel had a copy of the videotape, which may or may not have been intelligible. Defendant also has not shown that trial counsel had a copy of Chahine's testimony from Billie Rogers' trial. Indeed, it was defendant's financial inability to pay for that transcript that led his second attorney to withdraw from the case.

Third, defendant assumes that the "mere presence" theory was abandoned as a result. In fact, during opening statement defense counsel raised several potential defenses, including abandonment, mere presence, and inconsistencies between medical reports and prosecution witnesses' versions of the events. During closing argument, counsel argued that defendant abandoned the endeavor, and was shocked to return and find that Billie Rogers had suffocated her husband. There is nothing in the record to indicate that counsel failed to argue a "mere presence" defense in closing *because of the way Chahine testified*. We may not presume that counsel was ineffective. Indeed, it is possible that counsel declined to argue a "mere presence" defense because it would have diminished the credibility of defendant's version, in which defendant claimed that he was not present when his aunt suffocated the victim.[8]

B. Evidence Attacking Defendant's Character

Defense counsel elicited testimony from defendant that he had worked as an escort, but was not involved in prostitution. This opened the door for the prosecutor to ask about a pending prostitution charge against defendant. On appeal, defendant argues that counsel was ineffective for bringing out such "lifestyle" evidence rather than focusing on guilt or innocence. We disagree. Defendant had testified that he made a lot of money by running an escort service and had a boyfriend who would have paid for the $10,000 sex change operation. Although motive is not strictly an element of an offense, it is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). The concession of sordid details about defendant's lifestyle could have negated any financial motive, and also could have created an atmosphere of candor – especially since, as defendant argues on appeal, he made no effort to hide his sexuality from the jury. Defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy. As for the evidence that defendant was currently charged with prostitution, defendant has not shown that counsel was aware of that charge.

[8] Defendant testified that Billie suffocated her husband while he was still in the bathroom, and defendant came back into the kitchen and asked Billie what she was doing. Billie immediately removed the pillow from the victim's face, but the victim had already stopped moving.

C. Failure to Impeach Witness

During trial, Chahine testified that defendant did not drink much. Defendant argues that this contradicted a planned intoxication defense. Defendant argues that Chahine should have been impeached with prior statements made to the police about defendant's excessive drinking. Again, however, the record does not demonstrate, nor has defendant shown, that counsel was aware of the prior statements. Additionally, even if counsel was aware of the statements, defendant has not shown *why* counsel decided not to impeach the witness with those statements.

D. Jury Instructions and Deliberations

Defendant argues that trial counsel was ineffective for failing to request a jury instruction on the defense of abandonment, and for failing to object to the court's response to a jury note during deliberations.

Defendant has failed to identify the specific instruction he claims counsel should have requested, thereby precluding a determination whether the desired instruction would have accurately stated the law. To the extent defendant suggests that counsel should have requested CJI2d 9.4, we find no error. That instruction would have implied that defendant intended to commit the offense at one time, but "freely and completely gave up the idea of committing the crime." CJI2d 9.4(1). The instruction would have contradicted defendant's assertion that he thought Billie Rogers was joking, and was surprised to find her suffocating her husband.

Regarding the trial court's response to the jury's note, because we conclude in part VI, *infra*, that the court did not err in its response to the jury, we conclude that counsel did not err by failing to object.

E. Failure to Object to Prosecutor's Conduct

Defendant also argues that trial counsel was ineffective for failing to object to the prosecutor's arguments and tactics discussed in part IV, *infra*. Because we find no error in the prosecutor's arguments, defendant has not shown that counsel was ineffective for failing to object.

IV. Prosecutor's Conduct

Defendant next argues that the prosecutor committed at least five forms of misconduct during trial. We will consider each claim separately.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be

jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice, supra* at 438.

A. Vouching for Credibility and Allowing Perjury

Defendant argues that the prosecutor vouched for the credibility of its primary witness and failed to disclose that perjury was being committed. In addressing comparisons between Chahine's statements to the police during the investigation, and Chahine's testimony given at trial, the prosecutor asked the officer-in-charge whether the versions were consistent:

> *Q*. Now, the information that – you heard what Mr. Chahine's testimony was over the last two days in Court, did you not?
>
> *A*. Yes.
>
> *Q*. Is that the information that he related to you at the police station in Troy on August the 30th?
>
> *A*. *Generally*, yes.

Defendant argues that this questioning violated his right to due process for three reasons: (1) the prosecutor failed to disclose that Chahine was lying when he implicated defendant; (2) the prosecutor failed to disclose that the officer was lying when he said that Chahine's testimony was consistent with prior statements; and (3) the prosecutor vouched for Chahine's credibility via the officer's testimony. We disagree. Defendant has not shown that any witness committed perjury. Defendant reads too much into the officer's brief response, in which the officer qualified his answer using the word "generally." The officer's testimony may be equally interpreted as conveying that Chahine was presenting a somewhat different story in court because his testimony was only "generally" the same as information given at the police station. While a prosecutor may not ask a witness to comment on the credibility of other witnesses, he may attempt to ascertain which facts are in dispute. See *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Defendant also argues that the prosecutor vouched for the credibility of his witnesses when he stated several times in closing argument that "we know" certain facts, and "that's what happened" and "that was the truth." Again, defendant reads these statements too broadly. Viewed in context, they constituted proper comment on the evidence, and did not suggest that the government had some special knowledge about the facts. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (prosecutor cannot suggest that the government has some special knowledge that a witness is testifying truthfully).

B. Shifting the Burden of Proof and Denigrating Defense Counsel

During closing argument, the prosecutor addressed the differing points of view about which evidentiary matters were the most significant:

> The medical testimony in this case is not the crux of this case. This is the crux of tis [sic] case, and Mr. Cataldo [defense counsel] did not address this. Mr.

> Cataldo ran from this. There's an old saying in the law is [sic] that when you have the facts on your side, you pound on the facts. And when you have the law on your side, you pound on the law. And when you have neither the law nor the facts on your side, you pound on the table. That's what's going on here. This was not addressed. Mr. Cataldo says that we have to look at the medical testimony and I say look at the tape [in which defendant expressed remorse for killing Rogers].

Defendant argues that these remarks improperly implied that defense counsel had a duty to address certain facts, and denigrated defense counsel by implying that he was trying to mislead the jury. Viewed in context, however, we believe the remarks reflect a proper attempt to distinguish the different points of view urged by both sides in this case. *Watson*, *supra* at 593.

C. Right to Remain Silent

Next, defendant argues that the prosecutor improperly commented upon his right to remain silent when he asked the arresting officer about statements defendant made upon his arrest in Chicago. The officer testified that he and his partner went to defendant's apartment and informed him that they had a warrant for the murder of Donald Rogers.

> *A*. At this time, Mr. Titlow, spontaneously stated, where's my aunt? Is my aunt under arrest too? At that time, we stopped her and advised her – advised him of his rights and there was no further talking to her.
>
> *Q*. Okay. And you had not asked any questions prior to Titlow making that statement, had you?
>
> *A*. No, sir.
>
> *Q*. You said a spontaneous utterance?
>
> *A*. Yes, sir.
>
> *Q*. Alright. And then after he said that, you advised him of his rights?
>
> *A*. Yes, I did,
>
> *Q*. But what he said was, where's my aunt? Has she been arrested too?
>
> *A*. Yes, sir.
>
> *Q*. Any other comment about why you were arresting him or anything like that?
>
> *A*. No, sir.
>
> *Q*. Just where's my aunt?
>
> *A*. Is she under arrest too.

Evidence that a defendant made a statement and said nothing further does not denigrate the defendant's exercise of the right to remain silent. This isolated reference was not used to impeach defendant or to support the prosecutor's theory that defendant committed the offense and, therefore, does not support a claim of misconduct. See *People v Dennis*, 464 Mich 567, 583; 628 NW2d 502 (2001).

D. "Improper" Questioning of Defendant

Defendant argues that the prosecutor erred by asking about prior arrests not leading to convictions, defendant's sex life and preferences, and financial matters. The defense opened the door to these matters. The prosecutor did not err by asking follow-up questions testing the veracity of defendant's testimony. *People v Knapp*, 244 Mich App 361, 377-378; 624 NW2d 227 (2001) (a defendant may not introduce evidence at trial to sustain his theory and then argue on appeal that the evidence was prejudicial and denied him a fair trial).

E. Arguing Facts Not in Evidence

Finally, defendant argues that the prosecutor argued facts not in evidence when he misquoted Chahine in closing argument by stating that defendant told Chahine, "I don't know why I did it. I don't know why I held Don down while Billie smothered him. These are her words . . . two weeks after the murder." Defendant argues that he never made such a statement to Chahine. We find no error in the prosecutor's attempt to translate Chahine's testimony about defendant's statements into a first-person account by defendant. The gist of the allegations are the same: that defendant told Chahine that he did not know why he participated, and that he held the victim down. Although Chahine later distanced himself from the certainty of this testimony, the prosecutor was free to argue the inference that defendant held Donald Rogers down during the suffocation and not merely while Billie poured liquor down his throat.[9]

V. Continuation of Prosecution

Defendant argues that his due process rights were violated when the prosecutor continued to prosecute him, despite "knowing" that he did not commit the charged offense, knew that he had "passed" a polygraph examination, and had expressed satisfaction with the plea agreement that would have resulted in a manslaughter conviction.

The authority to prosecute for violation of state law is vested solely and exclusively with the prosecuting attorney. A trial court's authority over the discharge of the prosecutor's duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires. A decision to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor. Absent some reason to conclude that the prosecutor's acts are unconstitutional, illegal, or ultra vires, the prosecutor's decision whether to proceed with a case is exempt from judicial review. *People v Jones*, 252 Mich App 1, 6-7; 650 NW2d 717 (2002). If, however, a prosecutor continues to pursue charges knowing that a defendant is not guilty, the prosecutor would be committing an unconstitutional, illegal, or ultra vires act. Blackstone, Commentaries

[9] The jury was also instructed that the arguments of counsel are not evidence.

(Gavit, ed), p 807 ("[a] conspiracy to indict an innocent man of felony falsely and maliciously, who is accordingly indicted, is an abuse of public justice").

Here, defendant has not shown that the prosecutor "knew" that he did not commit the offense. We may not infer that the prosecutor "knew" that defendant did not commit the offense from the polygraph results or from the prosecutor's willingness to negotiate a guilty plea to a lesser offense. The shortcomings of polygraph examinations are well known. *People v Barbara*, 400 Mich 352, 358-359; 255 NW2d 171 (1977). Defendant deluded himself into believing that he was a woman, and the results of the polygraph examination could also have been delusional and, therefore, unreliable.

VI. Question from Jury

Defendant argues that the trial court erred by failing to respond when the jury asked a question during deliberations. The jury's note inquired about the "malice" element of second-degree murder:

> Does someone's inaction, non-action to stop or prevent a crime resulting in death amount to fulfillment of condition three, second degree murder, knowingly creating a high risk of death, knowing that death would likely be the result of his actions?

The trial court responded, "This is a question that is up to you to decide an answer." Neither party objected on the record.[10]

We find no error in the trial court's response, and therefore no prejudice from defense counsel's failure to object. First, we disagree with defendant's claim that the trial court failed to respond to the jury's question. The court responded by instructing the jury that "[t]his is a question that is up to you to decide an answer." Second, we conclude that the trial court's response was not erroneous. Defendant essentially seeks a ruling that, as a matter of law, inaction can never satisfy the malice requirement of second-degree murder. Defendant cites no authority in support of this proposition. In any event, the trial court separately instructed the jury on the elements of aiding and abetting, explaining that, in order to convict defendant of aiding and abetting murder, it was required to find that he "did something to assist in the commission of the crime," and that he "must have intended the commission of the crime alleged or must have known the other person intended its commission at the time of giving the assistance." Additionally, the court instructed the jury:

> It doesn't matter how much help, advice or encouragement the Defendant gave. However, you must decide whether he intended to help another commit the crime and whether his advice, help or encouragement actually did help, advise or encourage the crime. Even if the Defendant knew that the alleged crime was

[10] Defendant argues on appeal that an objection was made off the record. That assertion is not otherwise supported by the record. As a court of review, we must have a *record* to review.

> planned or being committed, the mere fact that he was present when it was committed was not enough to prove that he assisted in committing it.

Thus, the jury was properly instructed that it could not convict defendant unless it found that he actually intended and assisted in the commission of the crime.

The jury's note was not directed at the court's aiding and abetting instruction, but at the intent element of second-degree murder. In this regard, the court did not err by instructing that this fact-intensive consideration was a matter for the jury to decide. The court's response did nothing to undercut the court's earlier instructions whereby the jury was told that it could not convict defendant of aiding and abetting another unless he actually intended and assisted in the commission of the crime. Viewed as a whole, the court's instructions were not improper. See *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

VII. Cumulative Error

Finally, defendant argues that the cumulative effect of several errors deprived him of due process of law. However, because we have found no individual errors, there is no cumulative effect. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell